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Supreme Court of the United States.

OCTOBER TERM—1931.

No. 200—No. 201.

HARRY M. BLACKMER,
Petitioner,

v.

UNITED STATES,
Respondent.

REPLY OF PETITIONER TO RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRITS OF CERTIORARI.

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SUBJECT INDEX.

	PAGE
Preliminary	1
Respondent does not request the denial of writs of certiorari	1
Proper effect not given to applicable decisions of this Court	3
Arguments of expediency	5
Reply A	6
The invalid consular function	6
Respondent's doctrine of jurisdiction *in personam* by virtue of sovereign control	8
Respondent's South Dakota case on extraterritorial service of process	12
Respondent's erroneous classification of petitioner's cases	15
Respondent's irrelevant propositions urged in support of the subpoena's validity	19
The *in rem* or *quasi in rem* theory	19
The *sui generis* theory	20
The theory that no special form of procedure or notice is required	21
The alleged precedent of English Crown subpoenas	21
The alleged precedent from tax cases	22
The alleged precedent of cases punishing citizens in the United States for their crimes abroad	22
The alleged precedent from the reach of process within the United States	23
Summary of Reply A	24
Reply B.—Act does not provide valid jurisdiction to punish	26
Reply C.—Act does not provide for notice of the offense or the claim against the property	31
Reply D.—Search and seizure authorized by Act violates Fourth Amendment	35
Reply E.—Act violates due process because it authorizes trial and judgment in the entire absence of defendant without his consent	38
Reply F.—Denial to accused in criminal prosecutions of right to compulsory process	42
Reply G.—Arbitrary, unreasonable, capricious character of Act	44
Reply H-a—No proper showing for subpoenas	45
Reply H-b—Subpoenas did not carry notice of the Act	47
Reply H-c—Lack of notice to petitioner in the cases at bar of facts constituting offense and the claim against his property	48
Reply H-d—Abandonment of levy and seizure	50
Reply H-e—Petitioner not subpoenaed to attend a trial on April 9, 1928 (5132)	51
Conclusion	52

TABLE OF CASES CITED.

	PAGE
Baker v Baker, 242 U. S. 394	18
Baldwin v. Iowa State Traveling Men's Association, 283 U. S. 522 (prel. print)	42
Bartue v. Dutchess of Suffolk, 2 Dyers' Reports, 176b; 73 Eng. Reprint 383	21, 22, 48
Big Vein Coal Co v. Read, 229 U. S. 31	23
Bischoff v. Wethered, 9 Wall. 812	18
Boyd v. United States, 116 U. S. 616	37
Brown v Fletcher's Estate, 210 U. S. 82	18
Coe v. Armour Fertilizer Works, 237 U. S. 413	34, 35
Cook v. Tait, 265 U. S. 47	22
Cooke v. United States, 267 U. S. 517	33
Cooper v. Reynolds, 10 Wall. 308	18, 20
Crapo v. Kelly, 83 U. S. 610	5, 23
Dainese v. Hale, 91 U. S. 13	7
De la Montanya v. De la Montanya, 44 Pac. 345 (Calif.)	8, 15
Dillon Re, 7 Fed. Cas. p. 710; Cas. No. 3914	48
Dorr v. United States, 195 U. S. 138	8
Downes v. Bidwell, 182 U. S. 244	8
Federal Radio v. General Electric Company, 281 U. S. 464	22
Fisk, Ex Parte, 113 U. S. 713	20, 49
Freeman v. Alderson, 119 U. S. 185	18
French v. Edwards, 13 Wall. 506	47
Galpin v. Page, 18 Wall., 350—12, 19, 36	11, 18, 33, 47, 51
General Inv. Co. v. Lake Shore & M. S. Ry. Co., 250 Fed. 160	24
Glass v. The Sloop Betsey, 3 Dallas 6	6, 16, 18, 19
Go-Bart Co. v. United States, 282 U. S. 344	36, 37, 38
Gompers v. Bucks Stove & Range Co., 221 U. S. 418	44
Grable v. Killets, 282 Fed. 185	24
Grossman, In Re, 267 U. S. 87	28, 29, 39
Grubel v. Nassauer, 210 N. Y. 149, 103 N. E. 1113	15
Harkness v. Hyde, 98 U. S. 476	18
Hendrickson, In Re, 167 N. W. 172	12
Hodgson v. Bowerbank, 5 Cranch 303	8
Hovey v. Elliott, 167 U. S. 409	22, 44
Hurtado v. People of California, 110 U. S. 516	22
Knowles v. Luce, Moore 109; 72 English Rep. full reprint 473	21, 22, 48
Letters Rogatory from First Dist. Judge of Vera Cruz, 36 Fed. 306	43
Lewis v. United States, 146 U. S. 370	39
Mabee v. McDonald, 107 Tex. 139; 175 S. W. 676	9, 12, 15
Mellen v. Moline Iron Works, 131 U. S. 352	23
Michaelson v. United States, 266 U. S. 42	28, 29, 39, 44
Michigan Trust Co. v. Ferry, 228 U. S. 346	18
Minder v. Georgia, 183 U. S. 559	16, 18
Moss v. Fitch, 111 S. W. 475	15
McDonald v. Mabee, 243 U. S. 90	9, 10, 12, 18, 25, 31
Nichols v. Vaughan, 217 Mass. 548, 105 N. E. 376	13
Overby v. Gordon, 177 U. S. 214	18
Pennoyer v. Neff, 95 U. S. 714	17, 24, 25, 41
Perez v. Fernandez, 220 U. S. 224	23
Picquet v. Swan, 5 Mason 35	17

	PAGE
Raher *v.* Raher, 129 N. W. 494	15
Robertson *v.* Railroad Labor Board, 268 U. S. 619	5, 18, 21, 25, 46, 48
Roller *v.* Holly, 176 U. S. 398	18
Ross, In Re, Petitioner, 140 U. S. 453	6, 7
Rosser, Re, 101 Fed. 562	50
Rowland, Ex Parte, 104 U. S. 604	20, 49
Sawyer, In Re, 124 U. S. 200	20, 49
Schwartz *v.* United States, 217 Fed. 866	33
Smith *v.* Grady, 31 N. W. 477	15
Stuart *v.* Reynolds, 204 Fed. 709	33
Terry, Ex Parte, 128 U. S. 289	40, 41
The Schooner Exchange *v.* M'Faddon, 7 Cranch 116	15, 25
The Three Friends, 166 U. S. 1	38
Toland *v.* Sprague, 12 Peters 300	17, 18, 25
Union Square Bank *v.* Reichmann, 9 App. Div. 596 (N. Y.) 41 N. Y. Supp. 602	44
United States *v.* Heintz, 218 U. S. 532	44
United States *v.* La Franca, 282 U. S. 568	31
United States *v.* Mayo, 26 Fed. Cas. 1230, Cas. No. 15754	39
United States *v.* Shelton, 6 Fed. (2nd) 897	39, 40
United States *v.* Shipp, 203 U. S. 563	20, 49
Wilson *v.* Seligman, 144 U. S. 41	18
Windsor *v.* McVeigh, 93 U. S. 274	33, 34
Wood & Henderson, In Re, 210 U. S. 246	34

Table of Statutes Cited.

Sec. 57 of the Judicial Code	23, 24, 28
Title 22, U. S. C. Secs. 141, 143, 146, 163, 177, 191	8
Tit. 28, U. S. C. Sec. 701, Sec. 4071 R. S.	23, 43
National Prohibition Act	30

Textbooks and Encyclopedias Cited.

Com. Dig., Process A. 1	39
Cooley's Constitutional Limitations, (8th Ed.) Vol. 2, p. 852	8
Cyc. of Fed. Proc. Vol. 7, Sec. 3720	33
Greenleaf on Evidence (Redfield's Edition) Sec. 320	43
2 Hale, Pl. Cr. 1st Am. ed. (1847) 208	39
Holdsworth: A History of English Common Law, Vol. III, p. 605	39
Holdsworth, His. Eng. L. (3d ed.) Vol. II, p. 105	39
Hyde: International Law, Vol. I, pp. 460-462	6
Lambard, Eirenarcha (1607) p. 512	39
Lea—A History of the Inquisition of the Middle Ages, Vol. I, pp. 400, 433	46
Malloy's Vol. I, pp. 490, 528	8
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Miscellaneous Reports Cited.

Report on Extra territorial Crime and the Cutting Case by John B. Moore, Foreign Relations, 1887, p. 800	6
Report of the House Committee on the Judiciary No. 1313, (69 Cong. 1st Sess.; May 26, 1926), pp. 1, 2, 3	43

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM—1931.

No. 200. No. 201.

HARRY M. BLACKMER, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

REPLY OF PETITIONER TO RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRITS OF CERTIORARI.

To The Honorable, Charles Evans Hughes, Chief Justice of the United States, and the Associated Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

PRELIMINARY.

Respondent Does Not Request the Denial of Writs of Certiorari.

We first invite attention to the fact that respondent does not ask for denial of writs of certiorari (R. B. 45) and leaves unanswered the reasons relied on by petitioner for the allowance of the writs (Petition, pp. 13-18). Everything following respondent's formal opening statement that its brief is "in opposition to the pe-

titions for writs of certiorari" (R. B. 1) is in fact a brief in opposition to the brief of petitioner and to petitioner's incidental prayer for reversal of the judgments after review on the merits.

Among its other equally interesting contentions, respondent urges that under the Act,—process may be served "beyond the jurisdiction of the United States"; that such process, its service, and the accompanying tender of witness fees (all invalid under the common law) need not carry notice of the Act to render them valid; that *quasi in rem* (or *in rem*) procedure may be used to acquire jurisdiction to try a personal criminal offense; that a *quasi in rem* judgment may be used to punish a personal criminal offense; that one accused of a personal criminal offense may be tried and sentenced in his absence, without waiver of his presence, without requirement of official notice of the specific charges against him; that property of the accused may be seized in advance of trial and in advance of notice of an offense, to satisfy a possible fine resulting from a proceeding wherein the presumption of innocence prevails; that the ownership of "non-offending property" is a condition precedent to punishment of a criminal offense which may be committed by non-property owners as well as by property owners; that United States consuls abroad may perform functions delegated to them by Congress without the authority of a treaty; that letters rogatory are compulsory process and are available to defendants in criminal actions.

It is not strange, therefore, that counsel for respondent, while urging the validity of these features of the Act, and the procedure in the cases at bar, did not deny their importance, or their radical, unprecedented nature, and, hence, could not well contest their review.

Proper Effect Not Given to Applicable Decisions of This Court.

The Act, and the procedure under it in the cases at bar, if valid, will open to the Congress and to forty-eight state legislatures limitless, untouched power over the citizen which history indicates will be exploited promptly with resulting new crops of litigation in fields where this court has labored mightily to establish settled conceptions. This consideration alone called for careful attention to the opinions of this court and for thorough exposition of the support to be derived from them. Study of the opinion of the court below and of respondent's answering brief in order to determine the effect therein given to the precedents of this court, shows that:—

1. Neither the court below nor respondent cited a single case of this court *directly* supporting a single one of their respective theories on the points brought here by petitioner.

2. The court below did not distinguish a single decision of this court cited by petitioner—decisions which we say control the issues, but which under any viewpoint have bearing and which, we respectfully submit, should be accepted, reconciled or demonstrated to be irrelevant in any serious discussion of the issues. Respondent contented itself with an out-of-hand classification of a few only of the numerous decisions of this court cited by petitioner in his main brief herein (P. B. 26-27).

3. The court below and respondent cited cases of this court for *indirect* support of five of the points urged here by petitioner. Seven of the twelve points are without the support of a decision of this court.

The *indirect* support referred to is illustrated by that part of the opinion of the court below dealing with the question of the validity of the extraterritorially served subpoena (R., 5131, pp. 95-97; R., 5132, pp. 91-93). After

characterizing the question as the one of controlling importance in these cases, the court below declared the subpoena valid on a group of cases defining the duties of allegiance, but having nothing to do with methods for acquiring judicial jurisdiction *in personam*, on cases illustrating English Crown powers in direct conflict with the common law of this country at the time of the adoption of the constitution, on cases having to do with the direct exercise of power *within the United States over citizens within the United States* with respect to their offenses committed or taxes incurred while outside of the United States. Not one of the numerous beacon-light decisions of this court on the method for acquiring jurisdiction *in personam* and on the reach of process, was even mentioned.

4. The court below made no reference to one of the most important points in the cases, viz., that the Act, in derogation of the common law, fails to provide for notice to the accused of his offense or the claim against his property. The provisions authorizing trials *in absentia* of criminal contempt of court were disposed of on the amazing theory that Congress would have enacted the punishment procedure "irrespective of Sec. 4" of the Act which defines the offense (R., 5131, p. 99; R., 5132, p. 95).

The failure of zealous counsel for respondent to find direct precedents and their unwillingness to discuss the decisions of this court, afford additional demonstration of the unprecedented character of their theories and possibly of the fact that discussion of cases cannot profit their contentions.

Under these circumstances, the decisions of the court below, whether right or wrong, in a case of such notoriety, so sharply under the eye of the profession, launching into the law a dozen unprecedented doctrines, —are bound to leave serious doubts which if allowed to remain unclarified will inevitably open a veritable Pandora's Box of troublesome questions and new mischiefs.

Arguments of Expediency.

Respondent and the court below give weight to arguments of expediency to the effect that it is unthinkable that this government is helpless to command the testimony of its absent citizens; that such testimony might be as important as the citizen's military service (R., 5131, 106; R., 5132, 102; R. B. 25).

As to this, we think it sufficient to say (1) the Constitution itself renders the Government helpless to do many things it might otherwise desire to do. The restraint tends to preserve the proper liberties of the citizen. The power to summon a citizen from the ends of the earth by the extraterritorial exercise of judicial jurisdiction, whose testimony has never been given to any prosecutor or grand jury, and on a mere showing of a "belief" that the citizen could tell something important at the trial of persons already indicted and arrested, might well be considered as an arbitrary exercise of power to be repelled rather than legitimatized. (2) The Government has preserved its existence for about 140 years without the power, during which time prosecutors have worried along with evidence in hand. There is no record that judges, bar associations, or prosecutors (other than the special prosecutors in these cases) have clamored for the right to reach into foreign countries for witnesses. (3) The power as it relates to witness-subpoenas, puffed into the semblance of importance by likening it to the recall of absent citizens in time of war, meets the deflating opinion of *Crapo* v. *Kelly*, 83 U. S. 610, wherein this court pointed out that no official may go into foreign countries to seize citizens desired for military service. (4) The power as it relates to witness-subpoenas, puffed into the semblance of importance, by saying that the "Government" wants to use it, meets the deflating opinion of *Robertson* v. *Railroad Labor Board*, 268 U. S. 619, wherein it was held that the prohibition on extra-

territorial exercise of power applies to the Government as well as to private parties. (5) It may be conceded that the Act in question is unconstitutional without it following that a valid law could not be enacted which would serve the same purpose even more efficiently. If the authors of the Act had not sought their precedents in outlawry (seizure of property to coerce appearance), the Inquisition (subpoenas on "belief" and trials *in absentia*), and the religious quarrels of the reign of Queen Elizabeth (for the name of the crime—"recusancy"),—had instead paid more attention to the decisions of this court, a way would have opened. (6) It is a rather narrow expediency which sees a single witness and is blind to the impolicy of unauthorized exercise of power within the territory of foreign nations, of trials of citizens for criminal offenses *in absentia*, of trials of citizens for criminal offenses without notice, on mere showings of "belief", etc.

REPLY A.

The Invalid Consular Function.

Respondent argues (R. B. 15-16) that the consul in making the service of the subpoena acts in a ministerial rather than a sovereign capacity; that the Act designates him to save the expense of sending a specially deputized officer from the United States to make the service; that in respondent's opinion, the service might just as well have been made by registered letter, or by telegram, if so authorized by statute.

Consular functions, whatever their character, are limited to those provided in treaties and auxiliary legislation. *In re Ross, Petitioner,* 140 U. S. 453; *Glass* v. *The Sloop Betsey,* 3 Dallas 6; *Wheaton's International Law,* 8th Ed., Sec. 110, pp. 176-177; *Hyde on International Law,* Vol I, pp. 460-462; *Report on Extraterri-*

torial Crime and the Cutting Case, by John B. Moore, Foreign Relations, 1887.

Under the Act in question, the consul represents the United States court and delivers its command, which, if effective at all, is just as effective, is entitled to the same measure of respect and obedience, as a verbal command delivered directly from the bench by the judge of the court to a citizen within the court-room. We submit the service of a subpoena is the exercise of judicial jurisdiction; but whether it is the exercise of judicial jurisdiction, or the mere service of a notice, it is made a consular function by the Act, and as such, because it is not authorized by treaty, it is void. In the basic nature of the power exercised there is not the slightest distinction between the attachment of property by a United States consul which this court in *Dainese* v. *Hale,* 91 U. S. 13, declared could not be done validly without authority of a treaty, and the service by a consul of a witness-subpoena. Both are methods of acquiring judicial jurisdiction.

That the same function might be performed through the mails (if it might), or that the same function might be performed by a specially deputized officer (if it might) has not the slightest bearing; the point is not how it might have been done under a different act, but was it done validly, may a consul do it validly pursuant to the Act in question?

Whether the subpoenas were served against the will of France, or over the objections of France, does not appear of record; the main point is the subpoenas were served against the will of the United States Constitution which has no operation in foreign countries except by virtue of treaty. *In Re Ross, Petitioner,* 140 U. S. 453.

With a treaty, extraterritorial exercise of power is valid because the Constitution has provided treaty-making power (Const. Art. II, Sec. II., Cl. 2). *The right asserted by Congress, through the Act in question, to amend by statute the nation's consular conventions by*

adding consular functions not therein authorized, is a clear and unauthorized usurpation of the treaty-making power.

The power of this nation under the Constitution does not depend upon whether or not France objects to something or other, nor does the territorial field for the exercise of constitutional power expand or contract according to whether physical force is used.

It makes not the slightest difference in principle whether the extraterritorial exercise of power consists of armed aggression, of putting hand-cuffs on a citizen, of acquiring jurisdiction through attachment of property, or of handing a citizen the printed command of a court. The peaceable service of the subpoena is an invasion of the foreign sovereign. *Cooley's Const. Limitations (8th Ed.)* Vol. 2, p. 852; *De la Montanya* v. *De la Montanya* (Calif.) 44 Pac. 345, 346.

Every exercise of power by this nation to be valid must be under the Constitution. *Hodgson* v. *Bowerbank,* 5 Cranch. 303; *Downes* v. *Bidwell,* 182 U. S. 244; *Dorr* v. *United States,* 195 U. S. 138. The meticulous, carefully guarded limitation of the consular function will be noted by the most hasty glance at any of our consular conventions, and notably those between this nation and France. *Malloy's* Vol. I, pp. 490, 528. The express recogniton of Congress of the dependence on treaties of its legislation respecting consuls (particularly in their exercise of judicial power) may be noted in *U. S. C.* Tit. 22, Secs. 141, 143, 146, 163, 177, 191.

Respondent's Doctrine of Jurisdiction in Personam by Virtue of Sovereign Control.

As to respondent's theory that the subpoena is valid because of the "duty of protection of the citizen by the government and obedience by the citizen to his government whether at home or abroad" (R. B., 16):

It is intended that the theory shall supply the philosophical premise of a method for acquiring jurisdiction *in personam* over a citizen "beyond the jurisdiction of the United States" which does not depend upon the extraterritorial exercise of power. It is evident that the proponents of the theory must argue, as they do argue here, that the service of the subpoena under the Act is not an exercise of power, is nothing more than a notice of pre-existing jurisdiction *in personam* over the desired witness (R. B., 16).

The leading case on jurisdiction *in personam* by virtue of the duty of allegiance is *Mabee* v. *McDonald,* 107 Tex. 139; 175 S. W. 676, reversed by this court in *McDonald* v. *Mabee,* 243 U. S. 90. In *Mabee* v. *McDonald, supra,* the theory is termed the doctrine of "Sovereign Control". For convenience, we shall adopt that description of it.

Jurisdiction *in personam* by virtue of Sovereign Control assumes that such jurisdiction once authorized by statute is thereafter ever-present and continuous and all that is required to give it full effect in a particular case, as to a particular person, is to furnish notice of it.

Petitioner, on the other hand, takes the position that the court's command to a desired witness to attend a trial is a purely personal command; that before the court can validly charge an obligation to obey this purely personal command, it must acquire jurisdiction *in personam* over the desired witness; that jurisdiction *in personam* is not, and under due process cannot be, continuous and ever-present; that it is discontinuous, does not exist at all unless actually acquired in each case; that to comply with due process, jurisdiction *in personam* must be acquired by voluntary appearance or service of process within the territorial jurisdiction of the court; that service of process is an exercise of power; that by reason of the character of this nation as an equal sovereignty under the Constitution, the exercise of all governmental power, including the service of process, is confined to

the territory over which this nation exercises dominion, from which we draw the conclusion that the service of the subpoena which under the Act must be "beyond the jurisdiction of the United States", is invalid. Our position, we think, is clean-cut; it rests squarely upon oft-repeated principles in leading case opinions of this court. We shall not labor it further.

We summarize our opposition to the Sovereign Control method of acquiring jurisdiction *in personam* as follows:

1. Jurisdiction *in personam* in the Sovereign Control theory was squarely presented to and repudiated by this court in *McDonald* v. *Mabee,* 243 U. S. 90,* which reaffirmed that to comply with due process, methods for the acquisition of jurisdiction *in personam* must keep close to the fact that jurisdiction is power—is the power to seize (our main brief, pp. 26-27).

The principle of *McDonald* v. *Mabee, supra,* that jurisdiction is power, is the power to seize, applied in that case to the question of the validity of service by publication, which method of service proceeds on the presumption that a citizen is within the territorial jurisdiction (and at his domicile in cases of substitute service), is doubly condemnatory of the Act now before this court which excludes all such presumptions or fictions by expressly confining itself to persons "beyond the jurisdiction of the United States".

It should be added that the Act does not depend upon the citizenship of the desired witness, has no relation to "status" questions, makes nothing of the domicile of the absent citizen, or of whether the desired citizen is temporarily absent, or permanently absent, or whether

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**Footnote*: On page 26 of our Main Brief, it was inadvertently stated that *McDonald* vs. *Mabee, supra,* involved the question whether "extraterritorial service of process" is valid to establish jurisdiction *in personam.* The direct question in the case concerned the validity of service by publication for jurisdiction *in personam.* The invalidity of extraterritorial service appears from the repeated thought of the opinion that "the foundation of jurisdiction is physical power".

his residence is here or abroad, and respondent made nothing of those matters in its request for the subpoena (R. 5131, pp. 1-3; R. 5132, pp. 1-3). (Petitioner had been abroad continuously more than three years when the first subpoenas issued, R. 5131, pp. 7, 18, 19, and almost four years when the last subpoena was served. (R. 5132, pp. 8, 16-19.)

2. The special Act under consideration, in derogation of the common law, to be strictly construed according to its terms (*Galpin* v. *Page*, 18 Wall. 350)—(a) does not provide for jurisdiction to command the witness by virtue of Sovereign Control; the Act excludes the theory because it applies equally to citizens and to aliens (to citizens *or* to persons "domiciled" in the United States) (Act, secs. 1 & 2); (b) it does not fix a continuous duty on absent citizens, requiring merely a notice for its complete maturity; on the contrary, it provides that no subpoena shall issue except upon "a proper showing" in connection with a specific criminal case (Act, sec. 2); (c) does not provide punishment for failure to comply with an obligation matured with a notice; it provides punishment for failure to obey the command of the subpoena issued only after proper showing (Act, secs. 2, 7); (d) does not provide punishment for failure to obey a notice; (e) does not provide for converting the subpoena into a notice of pre-existing jurisdiction; it excludes such notions by providing the subpoena shall be a command to appear at a certain court to testify at a certain trial, at a certain time (Act, sec. 2), and that the service and default of the subpoena shall be the indispensable elements for jurisdiction to punish (Act, sec. 4).

The subpoenas served in the cases at bar did not contain notice of pre-existing jurisdiction over petitioner (R. 5131, pp. 7, 9; R. 5132, p. 4); they contained commands to appear. If the Act intended to provide any novel theory for establishing jurisdiction *in personam*, it would have required that the subpoenas must carry

notice of the Act. There is no such provision; the subpoenas issued in the cases at bar did not carry such notice (R. 5131, pp. 7, 9; R. 5132, p. 4). Respondent states the Act does not intend that they shall carry such notice (R. B. 41).

Respondent's South Dakota Case on Extraterritorial Service of Process.

Respondent declares: "A judgment *in personam* may be rendered in state courts against a citizen absent from the state, where service is personally made without the state under a statute so authorizing" (R. B. 28).

We pass the patent inconsistency of arguing "Sovereign Control" which is intended to obviate the extraterritorial exercise of power, and the instant theory which is directly based thereon.

Under this heading respondent cites *In re Hendrickson*, 167 N. W. 172 (So. Dak. 1918), the only case in its brief (omitted in the opinion of the court below where it was also urged) which squarely holds that jurisdiction *in personam* may be acquired by the extraterritorial service of process.

The South Dakota court based its decision on the doctrine of Sovereign Control which it took from *Mabee* v. *McDonald, supra.* We have seen that the doctrine was repudiated by this court in *McDonald* v. *Mabee, supra.* The *Hendrickson case,* decided in March, 1918, did not mention *McDonald* v. *Mabee, supra,* decided in March, 1917, and it must be assumed, therefore, that the latter decision was not brought to the attention of the South Dakota court.

There is additional irony in the fact that the Texas Supreme Court did not intend that its repudiated doctrine should cover extraterritorial exercise of power. Please note the following passage in the *Mabee* decision:—

(175 S. W., pp. 676, 688) "*Smith* vs. *Grady, Ex'r*, 68 Wis. 215, 31 N. W. 477. There a personal judgment by a Canadian court was held void because it was based solely upon service made upon the defendant in that action, personally in Wisconsin; there being no personal appearance * * * that decision rests squarely upon the proposition that 'jurisdiction cannot be acquired or exercised over persons or property without the territorial limits of the government where the court sits'; by 'service of process in another state or foreign country'. *That was not attempted in the case at bar.*" (Our italics).

The reason for the distinction is apparent from the fact that the doctrine of Sovereign Control is an invention designed to circumvent the prohibition on extraterritorial exercise of power.

Respondent also cites *Nichols* v. *Vaughan*, 217 Mass. 548 (1914), 105 N. E. 376, (also omitted in the opinion of the court below where it was urged). The quoted extract from the case which appears in respondent's brief seems to support the proposition that jurisdiction *in personam* may be acquired over one *domiciled* within the state (the Act does not depend upon the domicile of the absent citizen) by extraterritorial service of judicial process, but respondent fails to advise this court that the case went off on interpretation of a Massachusetts statute of limitations; that the Supreme Court of that state did not accept the opportunity, which it expressly considered, to rest its decision on the validity of extraterritorial service of process. The reason appears very clearly in the following language of the opinion:

(105 N. E. 377, 378) "The defendant contends that these decisions are no longer law because of *Pennoyer* v. *Neff*, 95 U. S. 714, 24 L. Ed. 565, wherein it was held that there could be no personal judgment against a non-resident defendant over whom jurisdiction was obtained solely by attachment of property. That case does not go to the extent of holding that the courts of the state in

which one is *domiciled* and to which he owes allegiance cannot acquire jurisdiction over him so as to be able to render a judgment *in personam* except after personal service of process upon him within the state. There are, however, expressions in several decisions of that court which lend support to that view. *Freeman* v. *Alderson*, 119 U. S. 185, 188, 7 Sup. Ct. 165, 30 L. Ed. 372; *Clark* v. *Wells*, 203 U. S. 164, 170, 27 Sup. Ct. 43, 51 L. Ed. 138; *Caledonian Coal Co.* v. *Baker*, 196 U. S. 432, 444, 25 Sup. Ct. 375, 49 L. Ed. 540; *Goldey* v. *Morning News Co.*, 156 U. S. 518, 521, 15 Sup. Ct. 559, 39 L. Ed. 517; *Mexican Central R. R.* v. *Pinkney*, 149 U. S. 194, 13 Sup. Ct. 859, 37 L. Ed. 699; *Noble* v. *Union Ring Logging Co.*, 147 U. S. 165, 173, 13 Sup. Ct. 271, 37 L. Ed. 123; *Harkness* v. *Hyde*, 98 U. S. 478, 25 L. Ed. 237. *Cooper* v. *Reynolds*, 10 Wall. 308, 19 L. Ed. 931, goes very far toward sustaining that contention. It is supported by *Raher* v. *Raher*, 150 Iowa, 511, 129 N. W. 494, 35 L. R. A. (N. S.) 292, Ann. Cas. 1912D, 680, *De la Montanya* v. *De la Montanya*, 112 Cal. 101, 44 Pac. 345, 32 L. R. A. 82, 53 Am. St. Rep. 165, *Smith* v. *Grady*, 68 Wis. 215, 31 N. W. 477, and *Moss* v. *Fitch*, 212 Mo. 484, 111 S. W. 475, 126 Am. St. Rep. 568. See Ann. Cas. 1912D, 680. Of course if that is the law under the fourteenth amendment of the federal Constitution, as established by the Supreme Court of the United States, it is authoritative and binding upon all state courts. *Eliot* v. *McCormick*, 144 Mass. 10, 10 N. E. 705. See also *Porter* v. *Prince*, 188 Mass. 80, 74 N. E. 256. *But however that may be, the point here presented is one of interpretation of our statute of limitations and not one of sufficiency of service of process.*" (Our italics.)

In view of the abundance of decisions of this court declaring what we conceive to be clear law on the jurisdictional point under consideration, we excluded discussion and citation of decisions by state courts from our main brief. If, however, this court should be interested in state decisions, it will be found that the following fully sustain every contention of petitioner as to the invalidity

of extraterritorially served process: *Moss* v. *Fitch et al.*, (Mo. 1908), 111 S. W. 475; *Raher* v. *Raher* (Iowa, 1911), 129 N. W. 494; *De la Montanya* v. *De la Montanya* (Calif. 1896), 44 Pac. 345 (cited in *McDonald* v. *Mabee, supra*); *Smith* v. *Grady* (Wisc. 1887) 31 N. W. 477; *Grubel* v. *Nassauer*, 210 N. Y. 149, 103 N. E. 1113 (Ct. of Appls.).

These cases adopt the premise, frequently repeated by this court, that no sovereignty can extend its process beyond its territorial limits to subject either persons or property to its judicial decisions, and several of the cases take pains by analysis of the opinions of this Court to make it clear that the prohibition applies equally to absent citizens and to absent non-residents. (e. g. *Moss* v. *Fitch*, 111 S. W. 475, 479; *Raher* v. *Raher*, 129 N. W. 494, 500-501; *De la Montanya* v. *De la Montanya*, 44 Pac. 345, 347-348). The dissenting opinion in *Raher* v. *Raher*, *supra*, supplied the Texas Supreme Court with its repudiated doctrine of Sovereign Control. (*Raher* v. *Raher*, 129 N. W. 494, 502; *Mabee* v. *McDonald*, 175 S. W. 676, 692).

Respondent's Erroneous Classification of Petitioner's Cases.

Under the heading which will receive later separate attention:—"Appellant fails to see that this proceeding is one *quasi in rem*, or *in rem*, and not *in personam*", is a numbered classification of certain of the cases cited by us which not only has no relationship to the proposition it is supposed to support, but which is so grossly misleading that we cannot allow it to pass unchallenged (R. B. 25-27).

It first classifies *Schooner Exchange Co.* v. *M'Faddon*, 7 Cranch. 116 (1812) as recognizing that sovereigns have extraterritorial power (R. B. 25-26). If it is meant that the case holds that sovereigns, *in the absence of consent, may exercise* power within the territory of other sover-

eigns, respondent might have rested its defense of the subpoena. But respondent did not mean that, and what is meant cannot be imagined in the light of Chief Justice Marshall's words:

> (7 Cranch. 136) "All exceptions, therefore, to the full and complete power of a nation within its own territory must be traced up to the consent of the nation itself. *They can flow from no other legitimate source*". (Our italics).

This court had already applied the principle in *Glass* v. *The Sloop Betsey,* 3 Dallas 6 (1794), a case apparently involving the exercise of admiralty jurisdiction in this country by French consuls over French citizens. This court said:—

> (3 Dallas 16) "And the said Supreme Court being further of opinion that no foreign power can of right institute or erect, any court of judicature of any kind, within the jurisdiction of the United States, but such only as may be warranted by, and be in pursuance of treaties, it is therefore decreed and adjudged that the admiralty jurisdiction, which has been exercised in the United States by the consuls of France, not being so warranted, is not of right".

The divisions of respondent's classification numbered 2, 3, 4 and 5 (R. B. 26) seem to drive to the point that the bar on extraterritorial exercise of power may be lifted by statute.

This court in *Minder* v. *Georgia,* 183 U. S. 559, approved the following:—

> (p. 562) "nor can we see how a person is deprived of life or liberty without due process of law on account of not having the benefit of the testimony of witnesses (absent non-residents) who are beyond the jurisdiction of the court, *when the law-making power of a state is powerless to make any provision which would result in the compulsory attendance of the witnesses,* * * *". (Our italics and parenthesis).

In *Toland* v. *Sprague*, 12 Peters 300, this court said:—

> (pp. 329, 330) "as to all those (absent citizens) who were not within the United States, it was *not in the contemplation of Congress* that they would be at all subject, as defendants, to the process of the circuit courts, which, by reason of their being in a foreign jurisdiction, could not be served upon them; *and, therefore, there was no provision* whatsoever made in relation to them". (Our italics and parenthesis).

The opinion went on to double-rivet the point:—

> (p. 330) "* * * but upon the principle which we have stated that Congress had not those in contemplation at all, who were in a foreign jurisdiction, it is easy to perceive why the restriction in regard to the process was confined to the United States. *Plainly because it would not have been necessary or proper to apply the restriction to those whom the legislature did not contemplate, as being within the reach of the process of the court, either with or without restrictions.*" (Our italics).

Whether the bar on extraterritorial exercise of power may be lifted by statute depends, of course, upon whether the bar exists by virtue of constitutional limitations. *Pennoyer* v. *Neff*, 95 U. S. 714, reasoned the invalidity of a service by publication from *the root principle* (p. 721) —"*that no state can exercise direct jurisdiction and authority over persons or property without its territory.*" The violation in that case of the root principle deprived the court of jurisdiction, and judicial procedure without jurisdiction was declared a violation of due process (pp. 733, 734).

The root principle dominates every case classified by respondent in the numbered divisions above referred to. For example, *Picquet* v. *Swan*, 5 Mason 35, (C. C. U. S. Mass. Op. by Mr. Justice Story, 1848), states it even more broadly, as follows:

(p. 40) "* * * a court created within and for a particular territory is bounded in the exercise of its powers by the limits of such territory. *It matters not whether it be a kingdom, a state, a county, or a city, or other local district. If it be the former, it is necessarily bounded and limited by the sovereignty of the government itself, which cannot be extraterritorial; if the latter, then the judicial interpretation is, that the sovereign has chosen to assign this special limit, short of his general authority*". (Our italics.)

The root principle, in one form or another, was also applied to federal judicial districts, to the states, to the United States, to foreign countries, to absent citizens and to absent non-residents in the following cases: *Galpin* v. *Page,* 18 Wall. 350; *Minder* v. *Georgia,* 183 U. S. 559; *Harkness* v. *Hyde,* 98 U. S. 476; *Wilson* v. *Seligman,* 144 U. S. 41; *Bischoff* v. *Wethered,* 9 Wall. 812; *Roller* v. *Holly,* 176 U. S. 398; *Freeman* v. *Alderson,* 119 U. S. 185; *Baker* v. *Baker,* 242 U. S. 394; *Overby* v. *Gordon,* 177 U. S. 214; *Brown* v. *Fletcher's Estate,* 210 U. S. 82, 89; *Michigan Trust Company* v. *Ferry,* 228 U. S. 346; *Cooper* v. *Reynolds,* 10 Wall. 308; *Toland* v. *Sprague,* 12 Peters 300; *Robertson* v. *Railroad Labor Board,* 268 U. S. 619; *Glass* v. *The Sloop Betsey,* 3 Dallas 6; *McDonald* v. *Mabee,* 243 U. S. 90.

The principle inheres as a limitation on equal, independent sovereignties, and, because this nation is an equal, independent sovereignty under the Constitution, it is a constitutional limitation; it is firmly imbedded in the decisions of this court; it has the specific protection of due process; it is beyond the power of Congress to destroy.

Respondent's divisions numbered 6 and 7 (R. B. 27) classify *Bischoff* v. *Wethered,* 9 Wall. 812, and *Glass* v. *The Sloop Betsey,* 3 Dallas 6. The former is said to have no bearing on allegiance and the duties of absent citizens. Respondent is quite right. No decision of this court ever

approved allegiance as a substitute for service of process or appearance in acquiring personal jurisdiction over our citizens, nor has this court ever authorized exercise of power "beyond the jurisdiction of the United States", on the ground of allegiance.

The case does, however, have bearing in connection with *Glass* v. *The Sloop Betsey, supra,* for the two taken together close the door to extraterritorial exercise of power in this country by foreign nations over their own citizens and over the citizens of this nation. *The limitation is reciprocal among equal, independent sovereignties.*

Respondent's Irrelevant Propositions Urged in Support of the Subpoenas' Validity.

The remainder of respondent's answer in defense of the subpoena consists of the utterly irrelevant propositions that: (a) The service of the subpoena is *quasi in rem* or *in rem;* (b) The service of the subpoena is *sui generis;* (c) No special form of procedure or notice is required; (d) Under the English common law subpoenas could be validly served abroad; (e) Subpoenas may be served abroad because citizens abroad may be taxed in United States on their incomes earned abroad, and because citizens may be punished in the United States for their crimes committed abroad; (f) Because Congress may extend process from one federal district into another, it may extend process into foreign countries.

We shall give these arguments brief, separate attention:

The in rem or quasi in rem theory—(R. B. 25-27).

In rem procedure concerns itself with adjudication of rights to property within the territorial jurisdiction. *Quasi in rem* procedure premises itself upon the attachment of property within the territorial jurisdiction.

Cooper v. *Reynolds,* 10 Wall. 308. The issuance and service of the subpoena under the Act have no relation to property or to its attachment, or to whether or not a desired witness owns property. It is issued to compel testimony—it has no relation to the adjudication *of anything* respecting the desired witness. The subpoena (under Section 2) is issued out of a criminal action. It is not until the desired witness disobeys the subpoena that *quasi in rem* or *in rem* procedure is resorted to for his punishment. If there were such a thing as valid *quasi in rem* punishment procedure it could not carry back to validate an invalid subpoena, and if the subpoena is invalid there can be no punishment by *quasi in rem,* or *in rem* procedure, or otherwise. *Ex parte Fiske,* 113 U. S. 713, 718. (See also *United States* v. *Shipp,* 203 U. S. 563, 573; *Ex parte Rowland,* 104 U. S. 604; *In re Sawyer,* 124 U. S. 200). The classification of authorities which is supposed to support respondent's theory now under discussion (R. B. 25-27) has already received attention (this brief, pp. 15-19). Suffice it to say for present purposes that not a single case classified gives the slightest support to respondent's notion that the extraterritorial service of a witness-subpoena is a proceeding *in rem* or *quasi in rem.*

The sui generis theory—(R. B. 29-32).

Respondent again confuses the contempt proceeding with the service of the subpoena. Whether or not the contempt proceeding is *sui generis* can have nothing whatever to do with the only question which now concerns us, to-wit, whether the subpoena, provided by a special Act in derogation of the common law and hence not *sui generis,* and issuing out of a proceeding in no way connected with the contempt proceeding, is valid or invalid. If the subpoena is invalid, the subsequent contempt proceeding is invalid, and it makes no difference how we label it. *Ex parte Fiske,* 113 U. S. 713, 718.

The theory that no special form of procedure or notice is required—(R. B. 33-34.)

The cases cited and quoted from make it clear that the notice referred to is the notice which must be given to a person charged with contempt. There is no question of contempt until after the subpoena has been disobeyed in the independent criminal action out of which it issued. Not until then does it become pertinent to inquire as to the requisites of a valid notice. The subpoena under the Act is a command to appear and testify (Act, sec. 2). It is not, therefore, a notice of an offense, and advice as to what constitutes such notice cannot be relevant under a point dealing exclusively with the validity of the subpoena.

The alleged precedent of English Crown subpoenas—(R. B. 18-19).

As to the English common law and Acts of Parliament providing contempt punishment in connection with the recall of absent English citizens, to which respondent cites *Bartue and Duchess of Suffolk's Case,* 2 Dyer's Rep. 176, b. 73, Eng. Reprint 383, and *Knowles* v. *Luce,* Moore's Rep. #(K. B.) 109, 72 Eng. Reprint 473: As was pointed out in our main brief (pp. 28-29): (1) English common law and English Crown powers are not important here for the reason that at the time of the first Judiciary Act, and before that, American common law (and due process in this country) required that *judicial jurisdiction in personam* must be acquired by appearance, or service at a place where the serving officer has authority to execute a writ of summons. *Robertson* v. *Railroad Labor Board,* 268 U. S. 619; (2) the recall of the absent citizens of England in those cases was by direct order of the Crown, not by a court, and the contempt was contempt of the Crown, not of the court. The right to recall was a Crown power resting on ancient prerogative (*Knowles*

v. *Luce, supra*), and therefore, the right, to the extent it exists in this country, reposes in the legislative or executive branches of our government. The right has never been claimed or exerted by the judiciary; it is not a judicial power, and hence Congress under the Constitution could not confer it upon the judiciary. *Fed. Radio Commission* v. *General Elec. Co.*, 281 U. S. 464; (3) the procedure in the *Bartue* and *Knowles* cases, *supra*, savored of outlawry which violates the rudimentary conception of the fundamental rights of the American citizen. *Hovey* v. *Elliott*, 167 U. S. 409, 444. Many arbitrary practices authorized by the omnipotent English Parliament were not regarded as inconsistent with the law of the land in England. In this country, written constitutions were adopted to protect the rights and liberties of the people against encroachment by their governments. *Hurtado* v. *People of California*, 110 U. S. 516.

The alleged precedent from tax cases—(R. B. 19-21).

Respondent cites *Cook* v. *Tait*, 265 U. S. 47, (1924): There is nothing in the case on the reach of process. Tait, the collector, was sued *in this country* by Cook, the taxpayer. Tait, the defendant collector, raised no question as to the manner in which jurisdiction *in personam* had been acquired over him. There is no revenue law which authorizes, and there is nothing in the *Cook case* which affirms the validity of process served "beyond the jurisdiction of the United States", or the validity of any other form of power exercised in foreign countries.

The alleged precedent of cases punishing citizens in the United States for their crimes abroad—(R. B. 21-25).

Respondent's statement of the proposition, including the element of punishment "in the United States" condemns it as irrelevant. We do not deny that citizens apprehended *in the United States* or *brought into the United States* may be punished *in the United States* for

offenses committed elsewhere. The point is: No officer can put his foot on foreign soil to arrest the offender without the consent of the foreign nation, and jurisdiction *in personam* cannot be exercised over the offender until he is found or brought within the territorial jurisdiction of the United States. (See cases cited in our main brief, p. 28). The inexorable character of the limitation is emphasized by the fact that (without treaties) this nation, even in time of war, cannot send its officers into foreign countries to round up absent citizens for military service. *Crapo* v. *Kelly*, 83 U. S. 610. All of our extradition treaties furnish further evidence to the same effect.

The alleged precedent from the reach of process within the United States—(R. B. 32-33).

Respondent argues (R. B. 32) that "process of a court may extend by legislative authority from one district to another", to which is cited *Big Vein Coal Company* v. *Read*, 229 U. S. 31; *Mellen* v. *Moline Iron Works*, 131 U. S. 352; U. S. C. Tit. 28, *Judicial Code and Judiciary*, Chap. 2, Par. 26. We thoroughly agree, but neither the proposition nor the authorities cited in its support have anything to do with the reach of original personal process into countries "beyond the jurisdiction of the United States", which, we repeat, is the only matter now pertinent for discussion.

Respondent then draws the conclusion that "likewise process of court may be extended by Congress to foreign countries" (R. B. 33); in other words, because Congress has power to authorize process to extend *throughout the United States*, it has power to authorize process to extend *throughout the world*. A patent *non sequitur*.

Respondent cites *Perez* v. *Fernandez*, 220 U. S. 224, a case under *Sec. 57 of the Judicial Code*, which relates exclusively to pure *in rem* actions in which jurisdiction attaches to the property *within* the territorial jurisdic-

tion of the federal court, and that which the absent person receives is a notice (described as such in Sec. 57) of the action *in rem* which cannot be the basis of jurisdiction *in personam*. This has been expressly declared in *Section 57* cases. See, for example, *Grable* v. *Killits*, 282 Fed. 185, 193 (C. C. A. 6th Circ. 1922; citing *Pennoyer* v. *Neff, supra*); *General Inv. Co.* v. *Lake Shore & M. S. Ry. Co.*, 250 Fed. 160, 178-179 (C. C. A. 6th Circ. 1918).

If the distinction needs to be made clearer, we can only repeat that the desired witness under the Act must be "beyond the jurisdiction of the United States"; that the subpoena has no relation to property within the jurisdiction of the United States; that it is a purely personal command to the desired witness issuing out of an action to which the desired witness is not a party; that the present question *does not* go to the validity of a notice of an action respecting a subject-matter *within* the United States, but that *it does go* to the method of acquiring personal jurisdiction over a citizen *outside* of the United States.

Summary of Reply A.

It is apparent, we respectfully submit, that the arguments of respondent here rest—(a) on narrow, more than counter-balanced arguments of expediency; (b) on theories as to the acquisition of jurisdiction *in personam* repudiated by this court as violative of due process, and by the express terms of the special Act in question in derogation of the common law; (c) on quibbling distinctions as to whether the consul exercises sovereign or ministerial power, urged in the face of this court's declaration that *any power* exercised by consuls without authority of treaty, is invalid; (d) on patent irrelevancies, such as—that the subpoena authorized by a special Act of Congress is *sui generis*, that it is process *in rem* or *quasi in rem*, although entirely unconnected with attach-

ment of, or jurisdiction over, property; that the subpoena is a notice of an offense, although there can be no offense until after the subpoena has been validly served and disobeyed; that because the reach of process of federal courts may be extended by Act of Congress into all districts within the United States, it may be extended by the same means throughout the world.

Certainly it is difficult, with all due respect we say it is impossible to reconcile such vagaries with *Schooner Exchange* v. *M'Faddon, supra,* which declared that an equal sovereign, in the absence of consent, is incapable of conferring extraterritorial powers, with *Toland* v. *Sprague, supra,* which declared that because process could not be served extraterritorially it could not be in the contemplation of Congress to authorize its extraterritorial service, with *Pennoyer* v. *Neff, supra,* and all of the cases which have followed it, which declared that extraterritorial exercise of judicial jurisdiction violates due process, with *McDonald* v. *Mabee, supra,* which declared that methods of acquiring jurisdiction *in personam,* to comply with due process, must not lose sight of the fact that jurisdiction is power, is the power to seize, with *Robertson* v. *Railroad Labor Board, supra,* and numerous other cases of this court which declared that jurisdiction *in personam* must be acquired by valid service of process or by voluntary appearance.

The cases at bar, on the validity of the subpoena alone, fit perfectly the ground which this court has said may be urged for review of certiorari, to wit, that the lower court "did not give proper effect (it gave no effect) to applicable decisions of this court". (Our parenthesis.)

REPLY B.

Act Does Not Provide Valid Jurisdiction to Punish.

Respondent confuses the essentially simple nature of the point now under discussion by incorporating, by reference, its arguments urged in support of the validity of the subpoena (R. B. 35). The validity of the subpoena and the validity of the punishment procedure each involves different theories, bound up in due process, for the acquisition and maintenance of jurisdiction. The subpoena, issuing and served without reference to money or other claims against the desired witness, without reference to "offending property", or attachment of property, or claims of any kind to or with respect to property—having nothing whatever to do with property, representing a purely personal command with respect to the purely personal matter of testifying, involves the question: Does the Act provide a due process method for acquiring jurisdiction *in personam* over the desired witness?

Of course, if the Act provides the same method for acquiring jurisdiction to punish disobedience of the subpoena as it does to acquire jurisdiction to command the testimony of the witness, the arguments urged for the validity of the subpoena apply equally to the validity of the punishment procedure.

But this is not the case. The Act contemplates that jurisdiction to punish shall be acquired by *quasi in rem* or *in rem* methods, as is shown by the facts—(1) there is no requirement that the defendant *must* be served with the citation to appear, (2) there is no requirement that the service of the citation *must* be proved, (3) a judgment under the Act may be had *"upon service by publication only"* (Act, sec. 8), (4) the Act makes attachment of property followed by publication of the citation a mandatory condition precedent to the punitive proceedings

(Act, sec. 6), (5) the court below held that the punitive proceedings are *quasi in rem* (R. 5131, p. 99, R. 5132, p. 95); respondent says they are *quasi in rem* or *in rem* (R. B. 35). The question thus presented under the present point is: Does such *quasi in rem* or *in rem* method of acquiring jurisdiction to punish satisfy the requirements of due process?

The obvious distinctions between jurisdiction *in personam* and jurisdiction *in rem* or *quasi in rem*, require that the jurisdictional question involving the subpoena and the jurisdictional question involving the punishment procedure, be considered separately, and recognition of these distinctions condemns respondent's commingling of argument.

By re-examining the contentions of respondent urged in support of the subpoena and having to do in fact with respondent's theory of the nature of the punishment procedure, it will be found that the position of the court below is unaffected except that respondent adds the idea in the alternative, that the punishment procedure is also *in rem*. The matter from the viewpoint of the court below and of respondent combines into the following: (a) the punishment procedure is *in rem;* (b) the punishment procedure is *quasi in rem;* (c) the judgment is completely satisfied out of the attached property; (d) the punishment procedure is *sui generis*, and, therefore, due process is accorded if defendant is advised of the charges and has opportunity to present his defense by witnesses and argument.

As to the *sui generis* theory: We have already made the point that the procedure cannot be *sui generis* because it is *express* procedure provided by the provisions of the special Act; that the Act is in derogation of the common law and must, therefore, be strictly construed according to its terms (our main brief, p. 33):

The express procedure of the Act is *in rem* or *quasi in rem*, and hence it cannot be *sui generis*. Furthermore, *sui generis* procedure exists by virtue of the inherent

power of our federal courts to protect their existence under the Constitution (*Michaelson* v. *United States*, 266 U. S. 42, 65-66; *Ex parte Grossman*, 267 U. S. 87, 117-118), from which it follows that if the procedure were not *in rem* or *quasi in rem*, it could not be *sui generis* for the reason that it is designed to acquire jurisdiction to punish failure to obey subpoenas served in foreign countries, and *no federal court ever claimed such power to be inherent.* Respondent admits this when it says (R. B. 35): "Of course, this proceeding is based upon the Act of July 3, 1926. *We concede that without this legislation it could not be maintained.*" (Our italics.)

As to respondent's contribution that the procedure is *in rem;* There is some warrant for this notion. *Sec. 8* of the Act provides for reopening judgments by following the *in rem* procedure of *Sec. 57 of the Judicial Code.* Respondent probably reasons that if *in rem* procedure is intended to reopen the judgment, it is intended also to give jurisdiction for the procedure leading to judgment.

In rem procedure, however, wherein the pleadings, the issues, the trial, the judgment and its satisfaction exclusively concern and directly affect property, works no greater magic than *quasi in rem* procedure discussed in our main brief (pp. 31-32). Testing *in rem* procedure against the facts of the Act, against that which the Act directs shall be accomplished, it will be noted: (a) Under the Act, the punitive procedure is commenced by a charge "of the service and default" of a personal witness-subpoena (Act, sec. 4). There is nothing in the Act authorizing the charge of a property matter; (b) Under the Act, the citation to appear, which issues after proof "of the service and default" of the personal witness-subpoena, contains the direction to the disobedient person to appear and show cause why he should not be adjudged guilty of contempt and be punished accordingly (Act, sec. 4). There is nothing in the Act which authorizes a citation to the disobedient person to appear and show

cause why property questions should not be adjudicated: (c) Under the Act, property is attached to satisfy a possible personal fine, if it should not be paid, as punishment for the personal contempt (Act, secs. 5, 7). There is nothing in the Act which provides that property shall be seized to satisfy a judgment respecting property disputes; (d) Under the Act, on the return day of the citation to appear, proof shall be taken on the personal issue of "recusancy" (Act, sec. 7). There is nothing in the Act to authorize proof as to the guilt of property or as to property disputes; (e) Under the Act, if the charge of "recusancy" shall be sustained, the court shall adjudge the defendant guilty of contempt and impose upon him a fine not exceeding one hundred thousand dollars (Act, sec. 7). There is nothing in the Act authorizing a judgment of guilt against property, or a judgment respecting disputed title or claims to property; (f) Under the Act, if the defendant does not pay his fine, the amount thereof shall be satisfied out of the property previously attached (Act, sec. 7). *There is nothing in the Act authorizing satisfaction out of the attached property of a pre-existing property claim. There is nothing in the Act providing that the attached property shall satisfy the personal judgment of guilt of contempt, which, therefore, must remain perpetually effective and unsatisfied. There is nothing in the Act to wipe out the judgment of guilt after the fine has been made out of the property. There is nothing in the Act which declares that making the fine out of defendant's property shall change the fine from a personal punishment to a punishment of property.*

Respondent admits the offense is criminal contempt of court (R. B. 37). Criminal contempt of court is a crime, is a personal criminal offense. The fundamental characteristics of other criminal cases and of criminal contempts are the same. *Michaelson* v. *United States*, 266 U. S. 42, 66-67 (1924; Op. by Mr. Justice Sutherland); *Ex parte Grossman*, 267 U. S. 87, 115-116 (1925; Op. by Mr. Chief Justice Taft). There is no such incon-

gruous, absurd thing known to the law as a personal criminal offense *in rem* or *quasi in rem*. Procedure against an individual for punishment of a personal offense affords perfect illustration of an action *in personam*.

A defendant violates the *National Prohibition Act* (or any other criminal statute), is found guilty, is fined $1,000. Is the judgment of guilt any less personal, is the fine any less personal, is the crime, is the trial any less personal, because the defendant fails to pay the fine and the marshal makes it by execution on the defendant's property seized *subsequent* to the judgment? The defendant, under the *Act of July 3, 1926*, is adjudged guilty of the personal criminal offense of contempt of court. Is the judgment any less personal, is the fine any less personal, is the crime, is the trial any less personal, because the marshal, instead of making the fine, as in the former case, out of defendant's property seized after the judgment, makes it out of defendant's property already in his hands? In reason and common sense, how can this difference *in what the marshal does* alter the personal character of the crime, the trial or the punishment? Is the fine or the judgment of guilty any less a personal punishment, is the crime or the trial any less personal because the fine is paid out of the defendant's property *instead of directly out of his purse* (as may be done under the Act, sec. 7)?

It must be clear that under the terms of the Act, and under any sane purpose attributed to the Act, the charge is the charge of a personal criminal offense; the issue and trial concern the defendant's personal guilt or innocence of that personal criminal offense; the judgment is a personal judgment of guilt or innocence of that personal criminal offense, with personal punishment of a fine, if guilty.

Rem, or *quasi in rem* procedure under the Act, therefore, is an artificial, arbitrary device for evading the re-

quirement of due process that jurisdiction *in personam* must be acquired by voluntary appearance or by service of process within the territorial jurisdiction of the serving officer (see our main brief, pp. 25-26), and possibly for introducing into our law the dubious benefits of outlawry. This court has repeatedly held that the label will not alter the substance; that fiction cannot substitute for the fair play of facts; that the arts of lexicography will not be permitted to alter the essential nature of a thing. *McDonald* v. *Mabee*, 243 U. S. 90-91; *United States* v. *La Franca*, 282 U. S. 568, 572 (1931; Op. by Mr. Justice Sutherland).

REPLY C.

Act Does Not Provide for Notice of the Offense or the Claim Against the Property.

We contend that the Act does not require actual or any other notice to the accused of the facts constituting his offense or of the government's claim against his property, and hence violates due process under the Fifth Amendment of the Constitution. Although squarely presented with this point, the court below ignored it entirely and confined its discussion of notice to whether in fact petitioner received notice in the cases at bar (R. 5131, pp. 98-99; R. 5132, pp. 94-95). Because respondent also stresses what it thinks was procedural notice afforded petitioner in the cases at bar (R. B. 35-36), we shall restate our position in order to avoid the slightest reason for further confusion of the matter.

1. The point now under discussion goes exclusively to the constitutionality of the Act. It does not go to the lack of procedural notice to petitioner in the cases at bar. The failure to furnish notice to petitioner is the subject of our procedural points H-b and H-c, our main brief, pp. 42-44, this brief, pp.

2. The Act does not require notice of the facts constituting the offense or the claim against the accused's property, as is shown by the following:

After the accused has disobeyed the command of a subpoena, there are only two matters, under the provisions of the Act, which can possibly come to his attention —(a) the *mandatory* publication of the citation to appear and show cause (Act, sec. 6); (b) the service (*not mandatory*) of the citation to appear and show cause (Act, secs. 6, 8).

There is no provision that the citation to appear shall include specification of the offense or the claim against the property. Neither the court below nor respondent has made any claim to the contrary. *The citation, under the Act, is a command to attend a general inquiry on an unspecified contempt* (Act, sec. 4).

The word "contempt" which must be included in the citation, connotates all of the innumerable possible obstructions of justice. It is not limited to the service and default of a particular witness-subpoena, or of a witness-subpoena under the Act. We have seen that a general citation to appear at a general inquiry is not a notice of specific charges (our main brief, p. 34).

If the citation to appear were intended by the Act to include specific charges against the accused and his property, it would be futile for the reasons: *First*—there is no provision for charging the desired witness with notice that the subpoena issued under the special Act (respondent admits this, R. B, 41), in the absence of which he is entitled to assume that it is a general subpoena issued under general law, and because served "beyond the jurisdiction of the United States", is void. *Second*—there is no provision requiring the punitive procedure to be identified with the Act. The witness, therefore, is entitled to assume that he is the object of a void proceeding to punish him for disobeying a void subpoena. *Third*—considering that under the Act there is no possibility of an "offending property" question; that at the

time of the attachment the Government has no money or property claim against the accused; that the presumption of innocence prevails,—it would be impossible to formulate anything but an arbitrary claim against the property.

3. The Act is special, is in derogation of the common law, must be strictly construed according to its terms, *"the conditions of its exercise over subjects or persons necessarily depend upon the terms in which the jurisdiction is granted"*, (*Galpin* v. *Page*, 18 Wall. 350, 372), and therefore, the Act must expressly authorize every step necessary for valid procedure under due process. This court and other federal courts have said that due process in contempt cases, not in the face of the court, requires that the accused shall be advised of the charges. *Cooke* v. *United States*, 267 U. S. 517, 537; that he should be clearly informed of the charges against him, and whether a civil or criminal contempt is alleged. *Schwartz* v. *United States*, 217 Fed. 866, 868 (C. C. A. 4th Cir. 1914); that the contemnor should have an opportunity to defend by informing him concerning the nature and particulars of the offense charged. *Stuart* v. *Reynolds*, 204 Fed. 709, 714 (C. C. A. 5th Cir. 1913); that the pleading, whether petition or information or other formal statement, by which the prosecution is initiated, should state completely the necessary facts constituting the offense, clearly apprising defendant of the nature of the charge against him and the acts which he will be called upon to meet. *Cyc. of Fed. Proc.*, Vol. 7, Sec. 3720 (citing many federal cases).

Due process requires notice of the claim against the property of the accused. In *Windsor* v. *McVeigh*, 93 U. S. 274, 279-280, this court said: "It is a rule, said the learned judge, (referring to the opinion of Mr. Justice Story, in *Bradstreet* v. *Neptune Ins. Co.*, Sumner 601) 'founded in the first principles of natural justice, that a party shall have an opportunity to be heard in his de-

fense before his property is condemned, *and that charges on which the condemnation is sought shall be specific, determinate and clear'.*" (Our italics.)

4. This court has held that to comply with due process special acts authorizing the taking of a citizen's property must contain an express requirement that the owner shall receive notice. *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413. The notice must be "*specific, determinate and clear*"; that it must advise the owner of the nature of the claim against him and the relief sought from the court if the claim is sustained. *Windsor* v. *McVeigh*, 93 U. S. 274, 279, 280, supra; *In re Wood & Henderson*, 210 U. S. 246, 254, 255.

5. Since we know that the Act must provide for notice which accords with due process notice; since we know what that notice must be; since the Act makes no provision for it—the Act is invalid.

To the foregoing, respondent answers (R. B. 35-36): that petitioner had the privilege of learning what it was all about by examining the trial court's records; that the Act does not contain a provision for notice similar to that of the Clayton Act which requires that a copy of the affidavit or information shall accompany the citation to appear and show cause; that here Congress authorized a different procedure; that Congress has the power to modify the form of procedure in contempt cases; that procedurally in the cases at bar petitioner received notice; that petitioner talked the Act over with his counsel; that the Constitution is silent as to the form of notice; that petitioner is estopped to deny that he received notice in the cases at bar (R. B. 35-36).

We must say, with all due respect to able and eminent counsel for respondent, that the court below accomplished as much by saying nothing.

Respondent's argument reverses due process by proceeding on the theory that instead of receiving proper notice, under the mandate of the statute, the defendant

must seek it out and serve himself. It is just another way of saying that proper notice need not be required. *Coe* v. *Armour Fertilizer Works, supra*, emphatically emphasizes that gratuitous notice, self-served notice, do not substitute for the due process requirement that the statute shall expressly provide for notice.

As to the suggestion of respondent that Congress has the power to modify the form of procedure in contempt cases: We do not say that the form of notice need be detailed in the Act. We do not care anything about the *form* of the notice. We do not say that the Act must require that the notice should be included in the body of the citation to appear, or should be included in an annex or in accompanying affidavits, or in any other particular way. Our contention is that this special Act in derogation of the common law prescribing a criminal offense and attachment and sale of the property of the accused, must provide *in some way, in some form,* for notice to the accused of the facts constituting his alleged offense and the claim against his property. Respondent does not argue the existence of such provision, and thereby admits all facts necessary to invalidate the Act.

REPLY D.

Search and Seizure Authorized by Act Violates Fourth Amendment.

Respondent says there is no word in the record showing "any unreasonable search", or any search in fact (R. B. 36). We are not attacking the *manner* in which the marshal executed his orders in the cases at bar. We are attacking the Act because no search and seizure under its provisions, no matter how nicely executed, could possibly be other than unreasonable. The finesse of the marshal cannot cure the vice of the Act. We stated the grounds in our main brief (p. 36).

Respondent says the Act provides for a levy and seizure, and nothing more (R. B. 36). We assume this statement is to carry the implication that the Act does not require a search. *Section 5* of the Act provides that the court shall direct "that the property of the recusing witness, at any place within the United States, * * * shall be levied upon and seized by the marshal" of the court. The Act does not provide any method whereby the property of the accused shall automatically find its way into the marshal's hands; does not provide for levy and seizure of property which does not have to be searched for; does not provide that the court shall designate the property or the place where it shall be seized; does not limit the levy and seizure to real property—any kind of property will do. The only boundaries to the place of levy and seizure are the boundaries of the United States (Act, sec. 5). How, therefore, can the marshal carry out the order of the court unless he searches for property of the accused and unless he levies upon and seizes the property wherever he may find it within the United States?

A general search is the precise thing authorized by the Act (a general search was the precise thing authorized in the cases at bar, R. 5131, p. 12, R. 5132, p. 11). General searches violate the *Fourth Amendment*. The recently decided case of *Go-Bart Co.* v. *United States*, 282 U. S. 344 (1931; Op. by Mr. Justice Butler), summarizes the law on the subject as follows:

> (p. 357) "*It* (first clause of the Fourth Amendment) *is general and forbids every search that is unreasonable; it protects all, those suspected or known to be offenders, as well as the innocent,* and unquestionably extends to the premises where the search was made and the papers taken. *Gouled* v. *United States*, 255 U. S. 298, 307. The second clause declares: 'and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized'.

> This prevents the issue of warrants on loose, vage, or doubtful bases of fact. *It emphasizes the purpose to protect against all general searches.* Since before the creation of our government, such searches have been deemed obnoxious to fundamental principles of liberty, they are denounced in the constitutions or statutes of every state of the union. *Agnello* v. *United States,* 269 U. S. 20, 33. The need of protection against them is attested alike by history and present conditions. *The amendment is to be liberally construed,* and all owe the duty of vigilance for its effective enforcement lest there shall be impairment of the rights for the protection of which it was adopted. *Boyd* v. *United States,* 116 U. S. 616, 623. *Weeks* v. *United States, supra,* 389-92. *There is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances.*" (Our parenthesis and italics.)

The general search, condemned in the *Go-Bart case, supra,* was made for the purpose of finding incriminating evidence. But the prohibition of the *Fourth Amendment* against unreasonable searches and seizures is not limited to searches and seizures for incriminating evidence. This was made clear in the *Boyd case,* 116 U. S. 616, where it was pointed out (pp. 623-630) that Writs of Assistance crystallized the sentiment culminating in the *Fourth Amendment,* and that such writs were not used to gather evidence to incriminate, but for the purpose of finding prohibited imports, or to find imports upon which duties had not been paid. The *Fourth Amendment* prohibits "every search that is unreasonable". It "emphasizes the purpose to protect against *all* general searches". *Go-Bart case, supra.* Moreover, it is rather difficult to distinguish in reasonableness between searches to incriminate and searches to find property for establishing a jurisdiction without which there could be no crimination.

Respondent says petitioner is a man of large affairs and that he ignored the orders of the court in a case of

large importance to the Government (R. B. 37). What has that to do with whether the Act provides for unreasonable searches and seizures? The *Fourth Amendment* draws no distinctions between persons of large and small affairs, or between cases of large or small importance to the Government. The *Go-Bart case, supra,* reaffirmed the established rule of this court that the Fourth Amendment "protects *all,* those suspected or known to be offenders, as well as the innocent".

Respondent says this court will not set aside a fine unless it is so grossly excessive as to amount to deprivation of property without due process of law (R. B. 37). What of it? We are not attacking the provisions of the Act providing for the imposition of a fine on the ground of excessiveness. For the reasons pointed out in our main brief (p. 36), we say the search and seizure authorized by the Act cannot possibly have a reasonable relationship to the fine regardless of its size. Perhaps respondent considers the search and seizure under the Act to be in the nature of a punishment. If so, we reply that such theory can only add to the unreasonableness of a search and seizure made prior to conviction and while the presumption of innocence obtains. Even the ancient Crown right to forfeit the goods of a felon did not attach until after conviction. *The Three Friends,* 166 U. S. 1, 50-51.

REPLY E.

Act Violates Due Process Because It Authorizes Trial and Judgment in the Entire Absence of Defendant Without His Consent.

Respondent reminds "the petitioner that this is a proceeding for punishment for criminal contempt and not for a crime", that "the procedure adopted was a substantial, if not a literal compliance with the statute"

(R. B. 37). Petitioner reciprocates the reminder that this court has held that criminal contempt of court is a crime, is a criminal offense. *Michaelson* v. *United States*, 266 U. S. 42, 66-67; *Ex parte Grossman*, 267 U. S. 87, 116.

Since petitioner was tried and adjudged guilty of criminal contempt in his entire absence and without his consent (T. R. 5131, pp. 67-68, 73, 84; T. R. 5132, pp. 51-52, 57, 81), we think it correct to say that the procedure (in this respect) adopted in the cases at bar complied with the statute. Whether or not the statutory authority for such procedure is valid, is the matter now under consideration.

Viewing the trial as an *in rem* or *quasi in rem* procedure, respondent naturally does not linger on the principle of criminal proceedings, as old as the law itself, that for jurisdiction to proceed the accused person must be in the power and under the control of the court in his person. *Holdsworth His. Eng. L.* (3d ed.), vol. II, p. 105; vol. III, p. 605; *Lambard Eirenarcha* (1607), p. 512; *2 Hale Pl. Cr.*, 1st Am. ed. (1847) 208, note citing *Com. Dig. Process*, A. 1.

Lewis v. *United States*, 146 U. S. 370

> (p. 372) "A leading principle that pervades the entire law of criminal procedure is that, after indictment found, nothing shall be done in the absence of the prisoner. While this rule has, at times and in the cases of misdemeanors, been somewhat relaxed,
>
> Note—Principal relaxation is that defendant *may consent* to trial in his absence. See *United States* v. *Shelton*, 6 Fed. (2d) 897; *United States* v. *Mayo*, 26 Fed. Cas. 1230, Case No. 15754).
>
> yet in felonies it is not in the power of the prisoner either by himself or his counsel, to waive the right to be personally present during the trial." (Our note.)

Ex parte Terry, 128 U. S. 289

The precise question was:

> (p. 311) "Whether the petitioner's retirement from the court room into another room of the same building, after he had been guilty of misbehavior in the presence of the court, and had violently obstructed the execution of its lawful order, *defeated the jurisdiction which it possessed, at the moment the contempt was committed, to order his immediate imprisonment* without other proof than that supplied by its actual knowledge and view of the facts, and without examination or trial in any form?"

This court said:

> (pp. 311-312) "If, in order to avoid punishment, he had absconded or fled from the building, immediately after his conflict with the marshal, the court, in its discretion, and in the circumstances rendered proper, could have ordered process for his arrest and given him an opportunity, before sending him to jail, to answer the charge of having committed a contempt. But in such a case the failure to order his arrest, and to give him such opportunity of defence would not affect its power to inflict instant punishment. *Jurisdiction to inflict such punishment having attached while he was in the presence of the court,* it would not have been defeated or lost by his flight and voluntary absence." (Our italics.)

How could this court make it clearer that direct control over the defendant must be acquired at some stage of the proceeding before he can be sentenced for criminal contempt of court?

A trial in the entire absence of the accused, in a misdemeanor case, is absolutely contrary to all general principles and practice and is illegal, null and void. *United States* v. *Shelton*, 6 Fed. (2d) 897, 899. Due process is a course of legal proceedings according to those rules and principles which have been established in our

systems of jurisprudence for the protection and enforcement of private rights. *Pennoyer* v. *Neff*, 95 U. S. 714, 733.

To justify trial and judgment in the absence of defendant, and without his consent, respondent argues that Congress, within limits not precisely defined, may regulate the inherent power of courts to punish contempt (Re B. 37).

Legislative sanction of trials *in absentia* is not a regulation of an inherent power of courts for the reason that courts have never claimed, in fact, have negatived the existence of such inherent power. That federal courts do not and will not claim such power to be inherent is, we think, amply evidenced by the lack of precedent for it (respondent does not cite a single case), and by the elaborate care which this court took in *Ex parte Terry, supra* (an inherent power contempt case), to make it clear that there was power to pronounce judgment on the absent defendant *by reason of his presence before the court when the contempt was committed.* If the inherent powers of federal courts cannot dispense with direct personal jurisdiction over a defendant who commits a contempt "in the face of the court," on what theory can those powers, or a "regulation" of them, excuse such jurisdiction when the defendant who committed the offense was "beyond the jurisdiction of the United States"?

It is not a regulation at all—it is an attempt by legislation to confer a new power, which, because it is not an inherent power essential to the preservation of the existence of the judiciary, should be subjected to the normal tests of due process.

Although admitting petitioner's reserved special appearances to challenge the constitutionality of the Act, and his objections to taking testimony in his absence (R. B. 37-38), respondent argues that because Mr. Battle took the stand to give testimony in mitigation of the offense charged, petitioner thereby made a general ap-

pearance and will not be permitted to urge the point under discussion. The contrary has been well established by this court (see cases, our main brief, p. 44). We add the recent decision in *Baldwin* v. *Iowa State Traveling Men's Association*, 283 U. S. 522 (Prel. Print) 1931, Op. by Mr. Justice Roberts), wherein it was said:

> (p. 525) (special appearance) "would save the question of the propriety of the court's decision on the matter even though after the motion had been overruled the respondent had proceeded, subject to a reserved objection and exception, to a trial on the merits. *Harkness* v. *Hyde*, 98 U. S. 476; *Goldey* v. *Morning News*, 156 U. S. 518; *Toledo Rys. & Lt. Co.* v. *Hill*, 244 U. S. 49; *Hitchman Coal & Coke Co.* v. *Mitchell*, 245 U. S. 229; *Morris & Co.* v. *Skandinavia Ins. Co.*, 279 U. S. 405". (Our parenthesis)

As to the cases cited by respondent (R. B. 38): Since this court has spoken, we see no reason for wandering into other fields.

REPLY F.

Denial to Accused in Criminal Prosecutions of Right to Compulsory Process.

Respondent says—"The Sixth Amendment provides for compulsory process, but does not provide for equal process". (R. B. 38) No authorities are cited to support the statement. In *In re Dillon*, 7 Fed. Cas., pp. 710, 712 (Case No. 3914), the court said that the provisions of the Sixth Amendment for compulsory process—"were obviously intended to abrogate the harsh and tyrannical rules of the common law * * *, and to place the accused in a position to make his defense and establish his innocence by giving him *rights in all respects similar and equal* to those possessed by the government for establishing his guilt".

Respondent says that the defendant in criminal cases may have letters rogatory under *Section 1* of the Act and if the witness refuses to respond he may be subpoenaed. (R. B. 38-39) *Section 1* of the Act does not grant letters rogatory to defendants in criminal cases; does not contain any new grant of right to letters rogatory. The section merely contemplates cases in which it is normal and proper to issue letters rogatory. Letters rogatory do not issue in criminal cases, for the reason, among others, that such method of securing testimony rests on the offer of the tribunal issuing the letters to do the like in a similar case for the tribunal to which they go. *Greenleaf on Evidence* (Redfield's Ed.) Sec. 320. *Sec. 4071 R. S.* (U. S. C. tit. 28, Sec. 701) prescribes the conditions under which federal courts will summon witnesses to respond to letters rogatory issuing in the courts of foreign nations. One of the conditions is that the action in the foreign country must be a *"suit for the recovery of money or property"*. This excludes criminal actions. *In re Letters Rogatory from First District Judge of Vera Cruz,* 36 Fed. 306. Under the principle of comity above mentioned it is not proper for United States courts to ask for more, and they will not receive more, than they are permitted under our own law to offer to other nations.

Furthermore, it appears from the *Report of the House Committee on the Judiciary, No. 1313* (69 Cong. 1st Sess. May 26, 1926) pp. 1-3, that *Section 1* was intended by Congress to apply to civil cases only; that respondent's distinguished counsel, the Honorable Aflee Pomerene, advocated the inclusion of *Section 2* of the Act because it was desired to secure testimony in criminal cases.

In addition, the *Sixth Amendment* requires "compulsory" process. Letters rogatory are not compulsory process for the reason that the foreign court cannot be compelled to take a single step with reference to the letters. "We cannot execute our own laws in a foreign country, nor can we prescribe conditions for the perform-

nce of a request which is based entirely upon the comity of nations, and which, if granted, is altogether *ex gratia.*" *Union Square Bank* v. *Reichmann,* 41 N. Y. Supp. 602, 605, 9 App. Div. 596. Under the terms of the Act, if the foreign court, for any reason sufficient to itself, does not call the desired witness, there is no right to ask for a subpoena (Act, sec. 1).

Appellee contends that because a defendant may be deprived of equal rights of appeal he may also be deprived of equal compulsory process, citing *United States* v. *Heintz,* 218 U. S. 532. (R. B. 39) It seems to us that the complete answer is—(a) that the *Sixth Amendment* guarantees compulsory process, whereas neither the *Sixth Amendment* nor any other part of the Constitution expressly guarantees compulsory right of review; (b) under the Act, defendants in criminal actions are not granted equal, substantially equal, or any compulsory process.

REPLY G.

Arbitrary, Unreasonable, Capricious Character of Act.

Respondent says the Act is not unreasonable, arbitrary and capricious because it provides a method for the punishment "in part" of the defendant through seizure of his property. (R. B. 39) This is a new thought; it is outlawry which "violates the rudimentary conceptions of the fundamental rights of the citizen." *Hovey* v. *Elliott,* 167 U. S. 409, 444. It is a theory which assumes conviction in advance of trial and in the presence of the presumption of innocence obtaining in contempt cases. *Michaelson* v. *United States,* 262 U. S. 42, 66-67; *Gompers* v. *Bucks Stove and Range Co.,* 221 U. S. 418, 450-451. If a capstone to the unreasonable features of the Act were needed, respondent now supplies it with this musty and obnoxious doctrine.

Respondent suggests that it is not unreasonable to make the ownership of non-offending property a condition precedent to judgment of guilt of a purely personal criminal offense because there is no reason to let a guilty rich man escape just because a guilty poor man cannot be taken. (R. B. 39) No reason other than that the property of neither the rich nor the poor should be seized in advance of rightful claim thereto; other than the revulsion which many feel over demagogy even though sponsored by the Congress.

Respondent thinks there is analogy between this feature of the Act, and the right where it exists, to attach property within the jurisdiction of an absent debtor. (R. B. 40). Respondent overlooks the facts that the debtor alleges his debt at the time of the attachment; that under the Act the Government does not and cannot allege a debt at the time of the attachment; that the presumption of innocence in contempt cases excludes a money claim for a fine when the attachment is made.

PROCEDURAL POINTS.

Reply H-a*—No Proper Showing for Subpoenas.

Respondent argues that a verified "belief" is a "proper showing" and may be accepted by the court in the exercise of judicial discretion.

The verifications in the cases at bar went to "the facts set forth" (R. 5131, p. 3; R. 5132, p. 3). No facts

*Footnote: On page 10 of respondent's brief is an excerpt from one of petitioner's briefs in the trial court to the effect that the proceedings in 5131 were "taken in exact pursuance of the Act". This statement, more narrowly expressed than intended, was for the purpose of the motion to vacate,—in order to strip the argument which we then made of everything other than constitutional questions. It is clearly apparent from the record that such was the purpose of the statement. That petitioner had no intention of making it as an admission in the further progress of these causes is abundantly evident from the vigor with which every step of the proceedings was challenged (R. 5131, pp. 39-51, 52-58, 67-68, 72-85; R. 5132, pp. 21-32, 35-42, 50-53, 56-81). Moreover, the procedural points being jurisdictional, they could be raised even on review. Respondent properly makes no special point of the matter. The court below did not mention it. We make this statement to rest any possible question.

were set forth. Every pertinent statement of the showings rested on a "belief". (R. 5131, p. 2; R. 5132, p. 2).

We do not deny that when the elements of a showing are before the court there is judicial discretion as to whether they constitute a "proper showing". We do assert, however, there is no discretion to abandon a provision of the Act by accepting something which is no showing at all. We assert that statements of unsupported "beliefs", whether or not verified, are not showings and hence could not be "proper" showings. We pointed out in our main brief that a proper showing, in contemplation of law, is proof of facts (our main brief, p. 42), which excludes proof of unsupported "beliefs". Determining and weighing "beliefs" were the function of the Inquisitor (*Lea: History of the Inquisition of the Middle Ages,* Vol. I, pp. 400, 433). Unsupported "beliefs" have never invoked judicial action. Even the beliefs of experts must be premised on facts in the case.

The Act provides a revolutionary, unprecedented extension of the reach of process. Citizens may be commanded to return from the remotest corners of the earth, wherever subpoenas may reach them. Prior to the Act, largely due to consideration for the convenience of witnesses, witness-subpoenas were confined to closely circumscribed orbits. When served outside of those orbits they were invalid. *Robertson* v. *Railroad Labor Board,* 268 U. S. 619, *supra.*

If restrictions were not thrown about subpoenas to be served "beyond the jurisdiction of the United States", there would be unwarranted requisitions for them with resulting interference in the liberties of absent citizens, wasteful expenditures of public funds, and abuse of judicial process. *Section 2* of the Act must have contemplated those dangers and must have intended to protect against them, for, otherwise, the Act would have provided that subpoenas should issue automatically as a part of administrative routine.

The provision being for the protection of the citizen, and therefore mandatory, (*French* v. *Edwards*, 13 Wall. 506, 511), the intent of the Act, and the language being clear, the contempt proceedings being special proceedings in derogation of the common law, the burden is on the Government of proving strict compliance. *Galpin* v. *Page*, 18 Walk 350, *supra*. The government met the burden of proving a "proper showing" by proving a record of "beliefs" which is exactly what a "proper showing" is intended to exclude.

Reply H-b—Subpoenas Did Not Carry Notice of the Act.

Respondent admits the subpoenas did not carry notice of the Act. (R. B. 40). It argues that such notice was not necessary because petitioner constructively and actually knew about the Act, and that under the common law a subpoena served extraterritorially *is valid.* (R. B. 40-41).

Let it be assumed, for present purposes, that petitioner was constructively charged with knowledge of the special Act (there could be considerable argument about that). Let it be assumed that petitioner discussed with his counsel the subpoenas and the special Act. *Unlimited discussion of the special Act could not identify a subpoena as a special Act subpoena if it did not carry notice of the fact. Unlimited discussion of a general law subpoena could not change such subpoena into a special subpoena under the special Act.* Petitioner and his counsel were also presumptively charged with knowledge that extraterritorially served general law subpoenas are invalid. Confronted with general law subpoenas (R. 5131, pp. 7, 9; R. 5132, p. 4), petitioner and his counsel were entitled to consider them invalid. Nothing done or said by the Consuls in making the services and tenders gave notice of the Act (R. 5131, pp. 8, 9-10; R. 5132, p. 5).

For the purpose of the present point, it might be conceded that extraterritorially served common law sub-

poenas are valid (of course, if that were true, there would be no point to the special Act), but nothing can be made of that, for respondent elected to proceed, and did proceed under the special Act in question. (See Records). Respondent must, therefore, prove that it complied with the special Act. This cannot be proved without proving that petitioner received subpoenas under the special Act. Respondent admits that petitioner received subpoenas which did not carry notice of the special Act (R. B. 40). The record shows and the court below stated, that petitioner received ordinary subpoenas (R. 5131, pp. 7, 9, 92, 102; R. 5132, pp. 4, 88, 98).

If extraterritorially served subpoenas were valid under the common law, disobedience of them would invoke normal contempt punishment. The punishment procedure invoked by respondent is *quasi in rem* or *rem* punishment which is in derogation of the common law. It is, therefore, unnecessary to reconsider *Bartue and Duchess of Suffolk, Knowles* v. *Luce,* and *Robertson* v. *Railroad Labor Board, supra.* Those cases have already received our attention (our main brief, pp. 28-29; this brief, pp. 15-18, 21-22).

Reply H-c—Lack of Notice to Petitioner in the Cases at Bar of Facts Constituting Offense and the Claim Against His Property.

Respondent says (R. B. 42) that the subpoenas received by petitioner advised him: (1) in what case to appear; (2) that it was by order of the President of the United States; (3) when and where to attend court; (4) to testify on behalf of the United States and not to depart without leave.

The subpoenas did not carry notice that they issued by order of the President (R. 5131, pp. 7, 9; R. 5132, p. 4). The subpoenas carried the usual presidential salutation (not required by the Act). If they had carried notice that they had issued by order of the President, the punitive procedure on that ground alone would have been in-

valid. The contempt under the Act is contempt of court, not of the President. Otherwise, respondent is correct as to the advice received by petitioner from the subpoenas.

The advice did not afford petitioner notice that he was subpoenaed under the special Act in question. A subpoena containing the advices above enumerated is a general law subpoena and is invalid when served extra-territorially (our main brief, pp. 24-30; this brief, pp. 8-25). An invalid subpoena cannot furnish the basis of punitive proceedings. *Ex parte Fiske*, 113 U. S. 713, 718. See also *United States* v. *Shipp*, 203 U. S. 563, 573; *Ex parte Rowland*, 104 U. S. 604; *In re Sawyer*, 124 U. S. 200.

The statement that petitioner was advised of the "object" of the hearing and seizure, is hardly illuminating. In 5131, petitioner was advised that there was to be a hearing on the general subject of "contempt". There was no notice that the hearing would have anything to do with a subpoena. (R. 5131, pp. 11-12). In 5132, petitioner was advised that there was to be a hearing on his alleged failure to obey an unidentified subpoena "heretofore issued" in the *Sinclair-Fall case*. (R. 5132, pp. 11-12). But petitioner had already received three subpoenas out of two trials of that case. (R. 5131, pp. 7, 9; R. 5132, p. 4). In 5131 and 5132, petitioner was advised that the Marshal had been ordered to seize undescribed property of petitioner to satisfy possible resulting judgments. (R. 5131, pp. 11-12; R. 5132, pp. 11-12).

Of course, to that extent, petitioner was advised of the "object" of the proceedings and of the seizures, but he was not advised of the *specific* "object" of the hearing, the *specific offenses* or the *specific claims* against the property to be adjudicated.

To illustrate: he was not advised (1) that the offenses or the claims against the property involved failures to obey definitely described subpoenas; (2) that such definitely described subpoenas were issued under the Act; (3) that they carried notice that they issued under the Act; (4) that the punitive procedures, the citations

and the notices were under the Act; (5) that the described property was levied upon and seized and held to satisfy possible judgments pursuant to authority of the Act.

We have seen that a general citation is not notice of an offense. *In re Rosser,* 101 Fed. 562 (C. C. of A. 8th Circ. Op. by Judge Sanborn).

We have seen that due process requires notice of the offense and specific, determinate and clear claims against the property. (Our main brief, p. 44; this brief, p. 33, *supra*).

Reply H-d—Abandonment of Levy and Seizure.

Respondent (R. B. 43) repeats the criticism of the court below to the effect that our cases on abandonment are not applicable here because there were two different seizures in two different actions.

It is true the principle was drawn from decisions which involved two seizures of the same property by the same party in the same action. But what is the distinction? The principle is based upon the presumption that the second seizure would not have been made if it had been intended to proceed on the first; hence, the second seizure is incompatible with the maintenance of the first and imputes its abandonment. What harmonizing element serving to stay the operation of the principle is introduced by a second cause of action, assuming, of course, that the two seizures are on *all* of the same property and are made by the same party? The principle is not an artificial thing bounded by the facts of four or five cases. It is just common sense—an adoption by the law of the every-day aphorism—"You can't eat your cake and have it too".

Entirely aside from the presumption of law, the physical facts shown by the record show abandonment in fact. There were no open equities in 5131 inviting the seizure made in 5132. *All* of the bonds were seized, taken in to the Marshal's custody, appraised, and dedicated for the jurisdiction and to secure a possible judgment in

5131. (R. 5131, p. 11). The action 5131 had not proceeded to judgment when the second seizure of the same property was made for the jurisdiction and to secure a possible judgment in 5132. (R. 5132, pp. 11-12, 56).

The seizure in 5132 did not pretend to be a seizure of outstanding or contingent equities. *All* of the same bonds previously, entirely and then dedicated to 5131, were dedicated to 5132; they were again seized and actually taken into the Marshal's custody and again were independently valued by a new group of appraisers (R. 5132, pp. 11-14). That is why we say the physical facts shown by the record show abandonment in fact of the first seizure and hence of jurisdiction in 5131. This cannot be refuted except by demonstration that two different things can occupy the same space at the same time.

The seizure in 5132 was invalid because it was not authorized by the Act which expressly provides that property seized shall be "held to satisfy any judgment that may be rendered against such witness in the proceeding *so instituted,*" (Act, Sec. 5)—not to satisfy the judgments of as many successive proceedings as shall suit the convenience or the policy of the prosecution or of the Marshal. The Act, in derogation of the common law, must be strictly construed according to its terms. The burden of showing jurisdiction is on respondent. *Galpin* v. *Page,* 18 Wall. 350, 371, 372.

Reply H-e—Petitioner not Subpoenaed to Attend a Trial on April 9, 1928 (5132).

Petitioner was adjudged guilty of contempt for not attending a trial on April 9, 1928. Petitioner was not subpoenaed to attend a trial on April 9, 1928; he was subpoenaed to attend a trial on April 2, 1928. Respondent contends that the "not depart" clause of the subpoena had the effect of requiring petitioner to attend on April 9, 1928. The "not depart" clause was not authorized by the Act. The Act provides that the subpoena shall command "the witness to appear before the court at a time

and place therein designated" (Act, Sec. 2). The purpose is to attend "the trial of a criminal action" (Act, Sec. 2). It follows, that under the Act, to be strictly construed, "general attendance", or "term", or "not depart" subpoenas, are not authorized. And, rightly so, for assuming the slightest attention to the convenience and liberties of the witness, Congress could hardly have intended that one summoned from any part of the earth "beyond the jurisdiction of the United States" to attend a trial on a date certain, should be required in addition to await indefinite further postponements not mentioned in the subpoena, and not before the court when the subpoena issued. If such had been the intention the Act would have said so.

Respondent states that had petitioner attended on April 2, 1928, he would have been advised of the continuances of the case. Respondent is wrong. *There were no proceedings of any kind on April 2, 1928.* On March 22, 1928, the case was set for April 4, 1928. On April 3, 1928, the case was set for April 9, 1928. (T. R. 5132, pp. 62-65).

CONCLUSION.

It is therefore respectfully submitted that these cases call for the exercise by this Court of its supervisory powers, and that writs of certiorari should be granted and this Court should review and reverse the decisions in these cases in the Court of Appeals of the District of Columbia.

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